FILED
MAY 25 1995
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No. 94-1805

# In the
# Supreme Court of the United States
OCTOBER TERM, 1994

THE CITY OF NEW ORLEANS, THE HUMAN RELATIONS COMMISSION AND EARL D. JACKSON, SR., IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE HUMAN RELATIONS COMMISSION,
Petitioners,

vs.

LOUISIANA DEBATING AND LITERARY ASSOCIATION, THE STRATFORD CLUB, THE BOSTON CLUB OF NEW ORLEANS AND THE PICKWICK CLUB,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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May 25, 1995

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## QUESTION PRESENTED

Considering the Court of Appeals' affirmance of the District Court's holding that four local social clubs (the "Clubs") were entitled, on an as-applied basis, to the First Amendment's "fullest protection" as private, intimate associations, a holding the Petitioners do not challenge, should the Court issue an advisory opinion delineating the extent to which the City of New Orleans (the "City") could have investigated the Clubs under its public accommodations ordinance had they not first obtained an adjudication of their rights in federal court?

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## CITATIONS TO OPINIONS BELOW

Respondents adopt the citations to opinions set forth in the Petition for Writ of Certiorari. In addition, Respondents refer to the March 5, 1993 Minute Entry and May 5, 1993 Order on Status Conference, set forth in their Appendix as Items 1 and 2.

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## STATEMENT REGARDING JURISDICTION

Petitioners seek an advisory opinion. Under Article III of the Constitution, this Court has jurisdiction to adjudicate only "cases" and "controversies" and may not issue advisory opinions.

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## CONSTITUTIONAL PROVISIONS INVOLVED

1. Article III, § 2, of the Constitution provides:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution . . . . . .

2. The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of

> religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of their grievances.

3. The Fourteenth Amendment, § 1, to the Constitution provides:

> ...[N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . . .

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## STATEMENT OF THE CASE

On page 2 of their petition, Petitioners state that the Ordinance in question "was modeled on a similar New York City ordinance upheld against a facial attack by this Court... ." Actually, as explained in the Court of Appeals' opinion (note 29 at A-34), the New Orleans ordinance is broader than the New York City ordinance in the critical definition of a public accommodation.

On page 5 of their petition, Petitioners incorrectly state the following: "Shortly after the actions were filed, the City advised the district court that it would not refrain from proceeding with any investigation of the Clubs during the pendency of the litigation, without the need for a restraining order." Inasmuch as the City actually advised the District Court of just the opposite, the inclusion of the word "not" in that statement is probably an inadvertent typographical error. Indeed, on March 5, 1993, the District Court issued a minute entry confirming the City's position

that it would not proceed with an investigation of the Clubs before the conclusion of the case. (B-1.) On May 5, 1993, the District Court entered an order providing that the "defendants [Petitioners] agree not to conduct any administrative investigation and agree not to take any adverse action against the plaintiffs [Respondents] pending the outcome of this case." (B-2-3.)

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## SUMMARY OF THE ARGUMENT

The petition for writ of certiorari should be denied. There are no "special and important reasons" to grant it, as required by Rule 10. Moreover, because Petitioners essentially seek an advisory opinion, there is no "case" or "controversy" presented for review as jurisdictionally required under Article III of the Constitution.

The issue raised by petitioners — *i.e.*, the extent of the City's right to investigate the Clubs under the Ordinance — is academic. The Court of Appeals found that the Clubs are located at the "most intimate" end of the spectrum of personal attachments and that "they enjoy the fullest protection of their right of private association." (A-33-34.) The Court of Appeals held that the Ordinance, as applied to the Clubs, violates the First Amendment because of the Clubs' protected private nature. Petitioners do not contest the judgment of the Court of Appeals. Indeed, Petitioners seek only a "clarification" of the decision below; reversal of the judgment is not even suggested.

Consequently, no administrative investigation of the Clubs under the Ordinance is necessary or appropriate. The only reason to conduct such an investigation would be to

gather facts necessary to determine whether the Clubs are sufficiently private to invoke First Amendment protection. Since the private nature of the Clubs has been judicially established, and their right to First Amendment protection is not now contested, an investigation would serve no purpose.

Second, the decision of the Court of Appeals is not in conflict with any decision of any other Court of Appeals or of this Court. To the contrary, the Court of Appeals followed the analysis set forth in *New York State Club Ass'n v. City of New York, Board of Directors of Rotary Int'l v. Rotary Club* and *Roberts v. United States Jaycees.* The Court of Appeals then applied the customary strict scrutiny test and correctly concluded that the City had not sustained its burden of establishing that it could not achieve its objective of eradicating discrimination by any less intrusive means of investigation than those authorized under the Ordinance.

Third, contrary to the contention made on page seven of the City's petition, the Court of Appeals' opinion presents no legal conundrum. The courts below held the Ordinance unconstitutional only as applied to the Clubs. The holdings of the courts below turned on the specific facts of this case, and the City does not contest the judgment. This Court has previously articulated the elements of private club status for First Amendment purposes, which the courts below followed in this case. If an organization other than the Clubs is threatened with an investigation under the Ordinance, and that organization does not successfully obtain federal court protection, then there is no obstacle

to the City's conducting an investigation and enforcing the Ordinance against it.

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## REASONS FOR DENYING THE WRIT

### I.

### Petitioners Seek An Advisory Opinion That Will Have No Effect On The Case Before The Court.

The question presented for review raises no justiciable controversy. After a detailed examination of the evidence establishing the Clubs' private nature, the Court of Appeals determined on the merits that the Clubs were private social organizations entitled to First Amendment protection. The Court of Appeals also found that the threatened administrative investigation under the Ordinance would impermissibly burden the Clubs' First Amendment rights.

The City does not now contest the private status of the Clubs; thus, the City need not investigate the Clubs to determine whether they are private. Because the City has accepted the judicial determination of the Clubs' private nature and therefore cannot apply the Ordinance to the Clubs, a decision by this Court with respect to the question presented by Petitioners will not decide any actual case or controversy between the parties. The Constitution does not authorize this Court to act absent a justiciable controversy:

> "[A]t an irreducible minimum, Art III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant' and that the injury 'fairly can be traced to the challenged action' and *'is likely to be redressed by a favorable decision'*...
>
> "The requirement of 'actual injury redressable by the court,' serves several of the 'implicit policies embodied in Article III.' *It tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.* The 'standing' requirement serves other purposes. Because it assures an actual factual setting in which the litigant asserts a claim of injury in fact, a court may decide the case with some confidence that *its decision will not pave the way for lawsuits which have some, but not all of the facts of the case actually decided by the court.*"

*Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 542-43 (1986) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) (citations omitted)(emphasis added)).

A decision on the question presented by Petitioners would not redress any grievance they have against the Clubs. Instead, the City requests an advisory opinion as to how and what investigations may be conducted by it in the

future with respect to other organizations that may or may not claim to be private clubs and may or may not fall within the holding of this case. Such advisory opinions are not granted by this Court. *Mistretta v. United States,* 488 U.S. 361, 385 (1989) ("In implementing this limited grant of power [under Article III], we have refused to issue advisory opinions or to resolve disputes that are not justiciable.") Further, the City's petition does not seek review of the *judgment* of the Court of Appeals, but instead seeks an opinion from this Court that will "clarify" the theory and principles underlying the Court of Appeals' ruling. ***The City does not even suggest that this Court reverse the judgment of the Court of Appeals.*** Therefore, Petitioners seek no relief that would have any effect on the dispute between the parties before the Court.

Finally, because the Court of Appeals held that the substantive provisions of the Ordinance could not be applied to the Clubs, the portion of its opinion evaluating the degree of intrusiveness of a City investigation under the Ordinance was not strictly necessary to its decision. The only purpose of such an investigation would be to determine if the Clubs had violated the Ordinance. For this reason, even if the opinion of the Court of Appeals erred with regard to the question presented, which the Clubs deny, the error would be harmless and would not subject the judgment of the Court of Appeals to reversal by this Court on review. *See*, 28 U.S.C. § 2111 (providing that the Court shall give judgment"...without regard to errors or defects which do not affect the substantial rights of the parties."); *United States v. Lane,* 474 U.S. 438, 445 (1986).

II.

**The Decision Of The Court Of Appeals Is In Accord With Previous Decisions Of This Court And Further Review Is Not Merited.**

Contrary to the City's assertion, not only does the decision of the Court of Appeals not conflict with this Court's decision in *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988), but it follows a number of this Court's pronouncements in that case. The facial challenge in the New York case did not concern, and the decision did not address, the permissible scope of inquiry and level of scrutiny constitutionally permissible in applying the municipal public accommodations ordinance there before the Court. On the other hand, the Court did find that the mere existence of the New York City ordinance threatened injury, and it expressly confirmed the right of individual private clubs to assert their First Amendment rights of privacy and association on a case-by-case basis when threatened with enforcement of the ordinance. *New York State Club Ass'n*, 487 U.S. at 9-10, 13-14. In the instant case, the Court of Appeals adjudicated just such an as-applied challenge, applying the strict scrutiny analysis in a manner well recognized by the decisions of this Court and the lower federal courts. *See Elrod v. Burns*, 427 U.S. 347, 362-63 (1976); *Clark v. Library of Congress*, 750 F.2d 89, 94 (D.C. Cir. 1984).

Despite the contention in the City's petition, the issue adjudicated in this case does not involve a novel and

significant constitutional question. As indicated below, this Court has previously recognized the privacy interests implicated in this case and the unconstitutionality of governmental regulation of such private relationships. The Harvard Law Review note, quoted out of context by the City in its petition, likewise concludes that the First Amendment protects private social clubs from governmental regulation of their membership. Note, *State Power and Discrimination by Private Clubs: First Amendment Protection of Nonexpressive Associations,* 104 Harv. L. Rev. 1835, 1837 (1991). The Court of Appeals' decision was thus grounded in standards that have been articulated by this Court on a number of occasions in the past.

This Court has held "that the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships." *Board of Directors of Rotary Int'l v. Rotary Club,* 481 U.S. 537-544 (1987). During the last decade, this Court has explained in detail the constitutional analysis appropriate to evaluate attempts under state and local public accommodations legislation to eliminate discrimination in organizations claiming to be private. *See New York State Club Ass'n v. City of New York; Board of Directors of Rotary Int'l v. Rotary Club; Roberts v. United States Jaycees,* 468 U.S. 609 (1984). The Court of Appeals relied closely on that analysis in the instant case and held that the Respondents are private clubs entitled to constitutional protection from unwarranted state intrusion. The City did not seriously contest on appeal the private status of the Clubs, and it does not contest that status in its petition.

The decisions of this Court cited above also establish that the extent of protection from governmental interference accorded personal relationships depends upon the degree of intimacy of the private association at issue:

> [T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees.
>
> Between these poles, of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursion by the State. Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.

*Roberts*, 468 U.S. at 620 (citations omitted). The Court of Appeals expressly followed *Roberts* and relied on the standards enunciated in that case by making a factual analysis of where the Clubs fell on the spectrum of constitutionally protected relationships. The Court of Appeals held that the Clubs were located at the most intimate end of the spectrum and, therefore, were entitled to a high degree of protection. Accordingly, the Court of Appeals held that the public investigation envisioned in the Ordinance could not constitutionally be applied to the Clubs.

After affirming the District Court's holding that the Clubs were private and entitled to protection under the First Amendment, the Court of Appeals then applied the customary strict scrutiny analysis to assess the degree of interference with the Clubs' associational rights that was likely to result from the threatened City investigation. As the Court of Appeals explained, the City had the burden of demonstrating that the purpose of the Ordinance — to eradicate discrimination in public accommodations — could not be achieved through means "significantly less restrictive" of the Clubs' associational freedom than the means provided for in the Ordinance. (A-35.)

As it did in the proceedings below, the City now ignores the requirements of the strict scrutiny analysis applied by this Court to governmental interference with First Amendment rights of citizens. *See Elrod v. Burns; Clark v. Library of Congress.* The City made no attempt on appeal or in the District Court to show that the methods of investigation authorized by the Ordinance were, with respect to the Clubs' First Amendment rights, the least intrusive methods to effectuate the purpose of the Ordinance. The Court of Appeals therefore held that the City had not satisfied the burden imposed on it by the strict scrutiny test:

> The City failed to address directly how its investigative methods and other procedures are the least intrusive interference with that right.

***

> In sum, the city has failed to meet its burden of demonstrating how the means it has selected to enforce the Chapter are the least intrusive of the Clubs' and their members' right of private association.

(A-35,40.)

No significant constitutional question is presented by the decision of the Court of Appeals on this issue, because the City made no meaningful attempt in either court below to demonstrate that the purpose of the Ordinance could not be achieved through procedures significantly less restrictive of the Clubs' First Amendment rights than those authorized by the ordinance.

For the reasons indicated above, this is a routine case involving the application of strict scrutiny analysis to governmental investigative procedures that implicate First Amendment rights. After determining that the Clubs were entitled to constitutional protection from unwarranted intrusion, and then finding that a threatened investigation under the Ordinance was so intrusive as to violate the privacy of the Clubs, the Court of Appeals applied the correct standard under strict scrutiny analysis and concluded that the Ordinance violated the Clubs' First Amendment rights inasmuch as the City had not satisfied its burden of establishing that the threatened investigation was not the least intrusive method of achieving the stated governmental purposes.

## III.

### The Decision Below Does Not Present A Legal Conundrum Concerning The Future Enforcement Of The Ordinance.

The City's argument that the Court of Appeals' decision presents a "legal conundrum" regarding the City's investigative powers under the Ordinance is unfounded. The judgments of the courts below apply only to the four Respondents who elected to prove their entitlement to First Amendment protection in federal court proceedings. The City's investigative powers under the Ordinance with respect to other organizations is not affected by the decision below.

The judgment below does not invalidate the Ordinance but holds only that it cannot constitutionally be applied to the Respondents. The judgment did not enjoin the City from investigating other organizations that claim to be private.

The stated purpose of the Ordinance is to eliminate discrimination in public accommodations. Once the Clubs established in federal court that they were not public accommodations subject to regulation under the Ordinance, then no legitimate governmental purpose could be served by investigating their affairs.

The fact-specific nature of the ruling below renders the question presented unsuitable for certiorari. The Court of Appeals' decision according constitutional protection to the Clubs is peculiar to the circumstances of this case and is not necessarily applicable to the Ordinance in other

circumstances. The permitted level of state regulation, whether substantive or investigatory, of any specific organization falling within the spectrum of constitutionally protected associations involves a detailed factual inquiry on a case-by-case basis. This Court has previously recognized this principle:

> [T]he nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case.
>
> ***
>
> Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. *We need not mark the potentially significant points on this terrain with any precision.*

*Roberts*, 468 U.S. at 618, 618-20 (emphasis added) (citation omitted); *see also New York State Club Ass'n. v. City of New York*, 487 U.S. 1, 15 (1988). Because of the fact-specific holding in this case, the City's concession that these Clubs are private, and the overwhelming evidence in the lower courts supporting the decision below, this is not an appropriate case for review by this Court.

For the reasons stated above, the City's legitimate interest in suppressing discrimination in public accom-

modations is not adversely affected by the Court of Appeals' decision in this case. That decision bars the enforcement of the Ordinance only against four genuinely private social clubs that elected to establish their status as constitutionally protected organizations in federal court before being granted injunctive relief against governmental investigations of their private affairs.

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## CONCLUSION

For the reasons indicated above, the Petition for Writ of Certiorari should be DENIED.

Respectfully submitted,

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**APPENDIX ITEM 1**

FILED
MAR 5 '93

MINUTE ENTRY
McNAMARA, J.
MARCH 5, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | | |
|---|---|---|
| LOUISIANA DEBATING and LITERARY ASSOCIATION, for itself and on behalf of its members | * | CIVIL ACTION |
| | * | NO. 93-658 |
| VERSUS | * | SECTION "D" (4) |
| THE CITY OF NEW ORLEANS, ET AL. | * | |

On this date, Bruce Naccari of the City Attorney's office confirmed that, without the necessity of a Restraining Order, no Defendant, including the Human Relations Commission, would proceed with an investigation of Plaintiff herein until the issues before this court are resolved.

* * * * * *

**DATE OF ENTRY MAR 5 1993**

**APPENDIX ITEM 2**

FILED
MAY 5 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| LOUISIANA DEBATING AND LITERARY ASSOCIATAION, ET AL. | CIVIL ACTION |
| versus | NO. 93-658 C/W 93-660, 93-661, and 93-685 |
| THE CITY OF NEW ORLEANS, ET AL. | SECTION "D" (5) |

**ORDER ON STATUS CONFERENCE**

The parties and the Intervenors have agreed upon this order and have presented it at a status conference held on May 5, 1993.

**Concerning Scheduling**

The plaintiffs and the defendants have agreed upon the scheduling matters herein stated, which are hereby ordered.

The defendants agree not to conduct any administrative investigation and agree not to take any

adverse action against the plaintiffs pending the outcome of this case. In light of this, no preliminary injunction hearing is necessary and the plaintiffs' motions for preliminary injunction and for in camera preliminary injunction hearings are withdrawn. Therefore, the Intervenors' opposition to the motion for in camera preliminary injunction hearings need not be addressed.